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INTERNATIONAL COMMERCIAL ARBITRATION

Draft Notes on Organizing Arbitral Proceedings

Report of the Secretary-General

1. The decision by the Commission to commence work on this project was taken at its twenty-sixth session in 1993 (report of the session: document A/48/17, paras. 291-296). Pursuant to that decision, the Secretariat prepared "draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (document A/CN.9/396/Add.1), which the Commission discussed at its twenty-seventh session in 1994 (report of the session: document A/49/17, paras. 111-195). Pursuant to those discussions, the Secretariat prepared a text entitled "draft Notes on Organizing Arbitral Proceedings" (document A/CN.9/410). The draft Notes were considered at the twenty-eighth session of the Commission in 1995 (report of the session: document A/50/17, paras. 314-373); on the basis of those considerations the Secretariat prepared the revised draft Notes, reproduced in the annex.

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Annex

[Suggested for inclusion at suitable place at beginning of publication]

Origin of the Notes

The Commission finalized the Notes at its twenty-ninth session (New York, 28 May - 14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993,1/ considered in 1994 a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings".2/ That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.3/ On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared "draft Notes on Organizing Arbitral Proceedings".4/ The Commission considered the draft Notes in 1995,5/ and a revised draft in 1996,6/ when the Notes were finalized.7/

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1 Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) (reproduced in UNCITRAL Yearbook, vol. XXIV: 1993, part one), paras. 291-296.

2 The draft Guidelines have been published as document A/CN.9/396/Add.1 (reproduced in UNCITRAL Yearbook, vol. XXV: 1994, part two, IV); the considerations of the Commission are reflected in the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, Official Records of the General Assembly, Forty-ninth Session Supplement No. 17 (A/49/17) (reproduced in UNCITRAL Yearbook, Vol. XXV: 1994, part two, IV), paras. 111-195.

3 The proceedings of the Congress are published in Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No. 7, Kluwer Law International, The Hague, 1996.

4 The draft Notes have been published as document A/CN.9/410 (and will be reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part two, III).

5 Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (and will be reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part one), paras. 314-373.

6 The revised draft Notes have been published as document A/CN.9/423 (and will be reproduced in UNCITRAL Yearbook, vol. XXVII: 1996, part two).

7 ...

Draft

NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Subject to the law governing the arbitral procedure, including fundamental requirements of procedural justice, arbitration rules agreed upon by parties typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.[8] This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

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[8] A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

Multi-party arbitration

[Variant 1:]
[If this variant is used, paragraphs 87-89 (item 18) should be deleted.]

6. Two-party arbitration and multi-party arbitration (i.e., a single arbitration that involves more than two parties) are not different as regards considerations about the need to organize arbitral proceedings, and as regards the kinds of matters that may be considered in that connection. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. Another difference, which, however, falls outside the scope of the Notes, concerns the drafting of a multi-party arbitration agreement and the constitution of the arbitral tribunal, both issues that may give rise to special difficulties in multi-party arbitration. Therefore, the Notes, limited to pointing out matters that may be considered in organizing arbitral proceedings in general, can be used in two-party as well as multi-party proceedings.

[Variant 2:]

7. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 87 to 89 (item 18).

Process of making decisions on organizing arbitral proceedings

8. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

9. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls. Meetings may be held at the venue of arbitration or at some other appropriate location.

10. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

11. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

12. Bearing in mind that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, the Notes do not attempt to describe in detail different arbitral practices or express a preference for any of them.

13. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order to not create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e., before it is clear that a decision is needed.

14. When using the Notes, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

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ANNOTATIONS

1. **Set of arbitration rules**

If the parties have not agreed on a set of arbitration rules, would they wish to do so

15. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it would be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

16. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

17. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine, on the basis of the law governing the arbitral procedure, how the case will be conducted.

2. **Language of proceedings**

18. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

19. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. It may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings. Documents that, in the interest of economy, might not need to be translated, or may have to be translated only in part, are, for example, business records (e.g., invoices, transport documents, construction records) or texts concerning the law applicable to the substance of the dispute (e.g., statutes, court decisions or commentaries).

(b) Possible need for interpretation of oral presentations

20. If interpretation will be necessary during oral hearings, it is advisable to consider whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

21. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. **Place of arbitration**

(a) Determination of the place of arbitration, if not already agreed upon by the parties

22. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

23. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; (e) location of the subject-matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

24. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (art. 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. **Administrative services that may be needed for the arbitral tribunal to carry out its functions**

25. Various administrative services (e.g., hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the parties have submitted the case to an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another

source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

26. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

27. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

28. To the extent the tasks of the secretary are purely organizational (e.g., obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g., collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto.

5. **Deposits in respect of costs**

(a) Amount to be deposited

29. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

30. When the arbitration is administered by an institution, the institution's services may include managing and accounting for the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

31. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g., because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

32. It is widely viewed that confidentiality is one of the essential and helpful features of arbitration. Nevertheless, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. While arbitration rules seldom contain comprehensive provisions on confidentiality, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

33. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g., pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g., because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole, (e.g., in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

34. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

35. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to

one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters, (e.g., dates for hearings) more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

8. **Telefax and other electronic means of sending documents**

(a) Telefax

36. While telefax offers many advantages over traditional means of communication, it is advisable to consider whether the equipment used offers satisfactory security as regards, for example, the possibility to verify the source of a message or to discover a distortion in a message. In light of those considerations, it might be decided that certain types of documents (e.g., written pieces of evidence) should not be sent by telefax or that certain telefax messages should be confirmed by mailing or otherwise delivering the documents whose facsimile was transmitted by electronic means. Nevertheless, to avoid rigidity when certain documents should not be sent by telefax, it may be appropriate for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g., electronic mail, magnetic or optical disk)

37. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g., as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

38. When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g., computer disks or electronic mail) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g., the names of the originator and recipient, computer program, titles of the electronic files, and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identifying persons who can be contacted if a problem occurs.

9. **Arrangements for the exchange of written submissions**

39. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal, rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

40. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

41. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submission be made after the hearings.

(b) Consecutive or simultaneous submissions

42. Written submissions on an issue may be made consecutively, i.e., the party who receives a submission is given a period of time to react with its counter-submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g., copies, numbering of items of evidence, references to documents, numbering of paragraphs)

43. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- number of copies in which each document is to be submitted;
- a system for numbering items of evidence, and a method for marking them, including by tabs;
- form for references to documents (e.g., by the heading and the number assigned to the document or its date);
- paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- inclusion of translations in the same volume as original texts or in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

44. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages (such as delay and possible adverse effect on the flexibility of the proceedings), it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute.

(b) In which order should the points at issue be decided

45. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g., a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

46. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier

decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of the defendant.

(c) Is there a need to define more precisely the relief or remedy sought

47. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

48. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Having regard to the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

49. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

50. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

51. Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

52. The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing

sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

53. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document, (b) a copy of a dispatched communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee, and (c) a photocopy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

54. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

55. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g., public accountant or consulting engineer). The report may present findings in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

56. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

57. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

58. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

59. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

60. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

61. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

62. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which imply interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see below, para. 68). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the

hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

63. If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

64. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

65. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

(iii) May witnesses be in the hearing room when they are not testifying

66. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) In which order will the witnesses be called

67. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

68. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

69. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g., certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. **Experts and expert witnesses**

70. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

71. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

72. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time-schedule. While the discretion to appoint an expert

normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

73. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

74. If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see above, paragraphs 61-63).

17. **Hearings**

(a) Decision whether to hold hearings

75. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

76. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings.

(b) Whether one period of hearings should be held or separate periods of hearings

77. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are

that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

78. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

79. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements, (b) questioning its witnesses, and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

80. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings, and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

81. Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the defendant present their opening statements, arguments, witnesses and other evidence; and whether the defendant or the claimant has the last word. In view of such differences, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

82. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that

have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

83. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

84. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

85. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

86. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

[The following item 18 forms part of variant 2 as indicated above in paragraph 7]

18. **Multi-party arbitration**

87. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings.

88. The areas of possibly increased complexity are, for example, the flow of communications among the parties and the arbitral tribunal (above, paras. 34, 35 and 39 to 42); if points at issue are to be decided at different points in time, the order of deciding them (paras. 45 and 46); the manner in which the parties will participate in hearing witnesses (para. 64); appointment of experts and the participation of the parties in considering their reports (paras. 71 to 73); the scheduling of hearings (para. 77); the order in which the parties will present their arguments and evidence at hearings (para. 81).

89. The Notes, limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not discuss the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions as compared to two-party arbitration. Thus, the Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in two-party as well as multi-party proceedings.

19. **Possible requirements concerning filing or delivering the award**

90. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g., to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, e.g., invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

91. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

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